

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

RUSSELL C. SMITH

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DOCKET NO. 81-77

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 25, 1981, Russell C. Smith ("Grievant") filed a grievance with the Vermont Labor Relations Board, alleging the State of Vermont ("State") violated the applicable collective bargaining agreements in including various comments on the performance evaluation he received upon his separation from State employment. Grievant alleged the comments adversely affected his rating and the purported work deficiencies referred to in the comments were not called to his attention by his supervisors during the rating period.

A hearing was held May 27, 1982, before the full Board at the Board hearing room in Montpelier. Grievant appeared pro se. The State was represented by Assistant Attorney General Marilyn Skoglund. At the hearing, the State agreed to remove the following comment on the performance evaluation which was part of this grievance: "Problems...calling in sick frequently and using sick days as earned".

Requested Findings of Fact were filed by the State on June 8, 1982. Grievant filed no memorandum.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a limited-status employee, as that term is used in the Agreement between the State of Vermont and the Vermont State Employees' Association, Inc., effective for the periods July 1, 1979 to June 30, 1981, and July 1, 1981 to June 30, 1982 (hereinafter referred to collectively as "the contract"). As such limited-status

employee, Grievant was entitled to all rights afforded to such employees by statute, by the Rules and Regulations for Personnel Administration, and by the contract.

2. At all times relevant herein, Grievant's position title was Employment and Training Field Monitor, and his work place was the Comprehensive Employment and Training Office (CETO), located at Waterbury, Vermont, and after June of 1981, at Montpelier, Vermont. Grievant worked under the supervision of Field Supervisor, Jim Clark.

3. As a field monitor, Grievant assessed the performance of contractors who were running youth job programs under the Comprehensive Employment and Training Act. He conducted on-site visits to the contractors, reviewed and monitored their programs' operations, gave program improvement advice to contractors, determined how contractors viewed the CETO program, and reported to Clark on recommendations for improvements in the program (Grievant's Exhibit 1).

4. On August 7, 1981, Grievant received his performance evaluation covering the period December 7, 1980 to August 18, 1981 (hereinafter "rating period"). Grievant received an overall rating of "3" ("consistently meets job requirements/standards"), and ratings of "2" ("inconsistently meets job requirements/standards"), "3" and "4" ("frequently exceeds job requirements/standards") in all factors. The following comments appear on the performance evaluation.

- (a) Assignments completed with uneven quality, too often needing correction.
- (b) ...does not always measure up to his full potential.
- (c) Instead of waiting for assignments or asking for work, he should learn to recommend to his supervisor tasks requiring attention within his general sphere of responsibility. He also needs to give attention to quality of work and work habits.

- (d) He certainly did not live up to his potential in any consistent way. His initiative towards outside projects far outdistanced any such drive towards his work.

(Grievant's Exhibit 3)

5. During the rating period, CETO was in a period of upheaval; funds were being cut and contracts with the youth employment contractors were being closed out. Much of Grievant's work involved closing out the contracts.

6. With the decrease in contracts, Grievant had to make fewer field visits. Grievant complained to Clark about not having enough work to do, and told Clark to either give him something to do or lay him off. Grievant was not given any specific additional assignments as a result of his complaints.

7. Clark encouraged Grievant to make recommendations concerning the operation of CETO. Grievant did reports containing recommendations to Clark for program improvement. These reports often remained in Clark's "in box" for two to three months before Clark reviewed them. Clark told Grievant CETO was unable to implement his recommendations.

8. During the rating period, Clark twice spoke with Grievant about using State time to conduct personal business and told him the practice must stop. On the performance evaluation received by Grievant on August 7, 1981, the following comment appears: "Problems...conducting of non-work related business on State time" (Grievant's Exhibit 3).

9. One of Grievant's duties involved updating trend charts on the youth programs. It was his responsibility to obtain information for the charts from Management Information Systems (MIS) and keep the information on the charts current. The statistics provided by MIS were supposed to be done by the 15th of each month; often-times they were not because the

contractors who were closing out their programs were sluggish about providing the necessary data to MIS. During the rating period, Clark reminded Grievant to keep the charts up-dated. At the end of the rating period, the trend charts were several months behind.

10. Grievant was assigned to prepare memoranda, letters, and reports for Clark's signature. At times, his drafts were not well done, at other times they were excellent. Some of the drafts were not in usable form; they were done hurriedly and had to be totally rewritten. Clark pointed out to Grievant the problems with the drafts on a case-by-case basis.

11. Clark did not specifically tell Grievant during the rating period he was not living up to his potential.

12. On the performance evaluation done of Grievant for the rating year immediately preceding the rating period in question, Clark made the following comment: "The challenge for the incumbent in the coming year will be...to exercise more initiative in reviewing youth program operations, identifying problem areas and recommending improved management procedures" (Grievant's Exhibit 11).

13. During the rating period, Grievant was not specifically told by his superiors to exercise more initiative or be more aggressive.

14. As a supervisor, Clark had a low-key, non-abrasive style. Generally Clark was not firm in pointing out work deficiencies to Grievant.

OPINION

At issue is whether the State violated the following language of Article XIII and 13 of the applicable contracts, which language is the same in both contracts:

During the rating year, immediate supervisors shall call the employee's attention to work deficiencies which may adversely affect a rating.

Grievant alleges various comments on the performance evaluation he received for the December 7, 1980 - August 18, 1981 rating period regarding uneven quality of completed assignments, not measuring up to his full potential, not recommending tasks requiring attention, and unacceptable work habits and work initiative violated this language. Grievant alleges these comments adversely affected his rating and the purported work deficiencies were not called to his attention during the rating period.

It is undisputed the comments made indicate work deficiencies. In our view, it is clear these comments adversely affected Grievant's performance evaluation. Any work deficiencies noted on a performance evaluation adversely affect a rating since their presence could conceivably hinder an employee's opportunities for promotion, transfer, or employment outside State government. Grievance of Martha Ewell, 5 VLRB 166 (1982).

Our next task is to determine whether the deficiencies were called to Grievant's attention during the rating period. We will discuss each specific comment in turn.

The first comment objected to by Grievant is: "Assignments completed with uneven quality, too often needing correction". We believe the State has met its contractual obligation here. Grievant was assigned to prepare memoranda, letters and reports for the signature of his supervisor, Jim Clark. Some of the drafts he did were not in usable form and had to be totally rewritten. Although Clark did not explicitly tell Grievant his assignments were completed with uneven quality, he did point out to Grievant the problems with the drafts on a case-by-case basis. We believe this constitutes adequate notice to Grievant the quality of his work could be improved.

The second comment in dispute is: "...does not always measure up to his full potential". We believe the inclusion of this comment on Grievant's performance evaluation is unfair given the status of the CETO office during the rating period. The office was in a period of flux with funds being cut and contracts being closed out. With the decrease in contracts, Grievant's workload decreased as he had fewer programs to monitor. Grievant asked Clark to give him something to do, but was not given any specific additional assignments as a result of his request. If Clark had a problem with Grievant's performance not measuring up to his potential during this period of upheaval, he in no way indicated that to Grievant. Grievant looked to Clark for guidance and was apparently not given any firm direction. We fail to see how Grievant can be faulted for this. A superior is required to give an employee clear indication s/he is dissatisfied with that employee's performance. We do not believe Clark was firm in telling Grievant he was not fulfilling his potential and find the comments should be stricken from the evaluation.

The third comment grieved here is: "Instead of waiting for assignments or asking for work, he should learn to recommend to his supervisor tasks requiring attention within his general sphere of responsibility. He also needs to give attention to quality of work and work habits". This comment appears on the evaluation under "Areas for Improvement" and addresses two distinct matters. With regard to the first sentence, Clark encouraged Grievant during the rating period to make recommendations concerning the operations of CETO. If the evidence indicated Grievant disregarded Clark's urgings, this sentence would be appropriate. However, Grievant did reports containing recommendations to Clark for program improvements.

Grievant's recommendations were not implemented, but we fail to see how this indicates he was not making recommendations "within his general sphere of responsibility". Again, we note the state of flux the CETO office was in during the rating period, and it was unclear what tasks Grievant had to perform. We find Clark was insufficiently firm in providing direction to Grievant, and Grievant cannot be faulted for this. Thus, this sentence should be deleted.

The last sentence of this comment, "he also needs to give attention to quality of work and work habits", appears to be a reinforcement of earlier comments on the evaluation relating to the uneven quality of his completed assignments and conducting of non-work related business on state time. Those comments were appropriately made, and noting them as an area for improvement is proper. Accordingly, this sentence should not be removed.

The final comment in dispute here is: "He certainly did not live up to his potential in any consistent way. His initiative towards outside projects far outdistanced any such drive towards his work".

As earlier stated, it was not indicated to Grievant during the rating period there was a problem with him not measuring up to his potential. In the same vein, we do not believe he was notified during the rating period of any problem with his work initiative. He had been told to "exercise more initiative" during the preceding rating period, but this did not fulfill the employer's contractual obligation to call the Grievant's attention to work deficiencies during the rating year. During the rating period, Grievant was reminded by Clark to keep trend charts on the youth programs updated. However, the currency of the trend charts appeared to be more of a problem of contractors, who were closing out their programs, being sluggish about providing the necessary information than an indication of Grievant's lack of initiative, and it is not at all clear Clark indicated this as an initiative problem to Grievant.

During the rating period, Grievant was also told to stop his practice of using State time for non-work related business. Yet, this was never presented to him as a problem with his work initiative. Accordingly, the reference to work initiative on his evaluation should be removed.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievance of Russell C. Smith is ALLOWED to the extent that the following comments on his performance evaluation covering the period December 7, 1980 to August 18, 1981, shall be removed:

- (a) ...does not always measure up to his full potential.
- (b) Instead of waiting for assignments or asking for work, he should learn to recommend to his supervisor tasks requiring attention within his general sphere of responsibility.
- (c) He certainly did not live up to his potential in any consistent way. His initiative towards outside projects far outdistanced any such drive towards his work.
- (d) Problems...calling in sick frequently and using sick days as earned; and

2. The grievance is DENIED to the extent that the following comments on the performance evaluation shall be retained:


- (a) Assignments completed with uneven quality, too often needing correction.
- (b) He also needs to give attention to quality of work and work habits.

Dated this 2nd day of July, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.


James S. Gilson